INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	8
Conclusion	22
Appendix	23

CITATIONS

Cases:

Doleman v. *Levine*, 295 U. S. 221	10
Erwin v. *United States*, 97 U. S. 392	13
General Motors Corp. v. *United States*, 286 U. S. 49	15
Goodman v. *Niblack*, 102 U. S. 556	13
H. M. O. Lumber Co. v. *United States*, 40 F. 2d 544	12
Hobbs v. *McLean*, 117 U. S. 567	13
Home Insurance Company, The v. *United States of America*, 171 F. 2d 374, pending on petition for writ of certiorari, No. 620, this Term	9, 18
Houston v. *Ormes*, 252 U. S. 469	14
Independent Wireless Co. v. *Radio Corp.*, 269 U. S. 459	15
John Shilloto Co., The v. *McClung*, 51 Fed. 868	12
Lappin v. *National Container Corp.*, 179 Misc. 109 39 N.Y.S. 2d 800	20
Martin v. *National Surety Co.*, 300 U. S. 588	13, 19
Price v. *Forrest*, 173 U. S. 410	13, 14
Spofford v. *Kirk*, 97 U. S. 484	12
U. S. Alkali Assn. v. *United States*, 325 U. S. 196	15
United States v. *Borden Corp.*, 308 U. S. 188	15
United States v. *Gillis*, 95 U. S. 407	12
United States v. *Jackson*, 302 U. S. 628	15
United States of America v. *World Fire and Marine Insurance Company*, No. 3715, C. A. 10, pending on petition for writ of certiorari, No. 618, this Term	9, 18
United States of America v. *Hill*, 171 F. 2d 404	11
Yorkshire Insurance Company v. *United States of America*, 171 F. 2d 374, pending on petition for writ of certiorari, No. 619, this Term	9, 18

Statutes:

Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, as amended by the Act of August

Statutes—Continued

Page

1, 1947, c. 446, sec. 1, 61 Stat. 772, 28 U.S.C. 931(a), 932, 942, 943, and 944:
Sec. 410(a) 23
Sec. 411 16
Sec. 420 23
Sec. 421 23
Sec. 422 25

New York Workmen's Compensation Law:
Sec. 29, Subdivision 1 as amended by L. 1947, c. 9 and 144 ..... 11, 14, 29
Sec. 29, Subdivision 2 ..... 7, 20, 30
R. S. 3477 as amended, 31 U.S.C. 203 ..... 6, 8, 12, 14, 18, 28
Tucker Act, Act of March 3, 1887, c. 359, 24 Stat. 505 16

28 U.S.C., as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.:
Sec. 1346 (b) 8, 23
Sec. 1346 (c) 16, 17, 24
Sec. 1402 (b) 24
Sec. 2401 (b) 24
Sec. 2402 25
Sec. 2412 (c) 25
Sec. 2674 ..... 8, 25
Sec. 2678 ..... 7, 20, 26
Sec. 2680 26

Miscellaneous:
Workmen's Compensation: An Outline of Legislation in the United States and Territories as of January 1, 1943, Bulletin No. 56, United States Department of Labor, p. 1 19

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 617

UNITED STATES OF AMERICA, PETITIONER

v.

AETNA CASUALTY AND SURETY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 4, 1948.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 20-24) is reported at 76 F. Supp. 333. The majority opinion of the United States Court of Appeals for the Second Circuit, and the opinion of Judge Learned Hand, concurring in part (R. 30-35), are reported at 170 F. 2d 469.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1948 (R. 36). On January 28, 1949, this Court granted the United States an extension of time to and including March 4, 1949, within which to petition for certiorari (R. 38). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition of R.S. 3477, 31 U.S.C. 203 against the assignment of claims against the United States, may be invoked by the United States to bar recovery of a judgment against it under the Federal Tort Claims Act, on the claim of an injured person covered by workmen's compensation insurance, where the insurance carrier, which has paid compensation benefits to such person, brings suit in its own name as the assignee under state law of the entire cause of action.

STATUTES INVOLVED

The Federal Tort Claims Act, Sections 1346 (b), 1346 (c), 1402 (b), 2401 (b), 2402, 2412 (c), 2674, 2678, and 2680 of Title 28,[1] United States Code;

[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Federal Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations in this petition

the pertinent provisions of R.S. 3477 as amended, 31 U.S.C. 203; Section 29, Subdivision 1 as amended and Subdivision 2 in pertinent part, of the New York Workmen's Compensation Law are set forth in the Appendix, *infra*, pp. 23-31.

STATEMENT

Peter Vambell, in the course of his employment as a guard and registered mail convoy for the Federal Reserve Bank of New York, was injured on February 8, 1945, on the loading platform of the General Post Office in the Borough of Manhattan, when he was struck by some mail sacks which fell from a conveyor, allegedly through the negligence of the post office employees (R. 4). Vambell filed a claim under the New York Workmen's Compensation Law and was awarded compensation for his injury (R. 5-6). Respondent, Aetna Casualty & Surety Company, the insurance carrier for the Federal Reserve Bank of New York, paid this compensation, together with the medical benefits to which Vambell was entitled (R. 5-6).

Although the injury could have been made the subject of an action under the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842), Vambell did not bring an action against the United States. Respondent, however, on May 28, 1947, brought this action against the United States under the Fed-

---

are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

eral Tort Claims Act to recover $20,000 as damages for Vambell's injuries, alleging that by operation of the New York Workmen's Compensation Law Vambell's entire cause of action had been assigned to it (R. 6-7). For a second cause of action, respondent alleged that under its policy with the Federal Reserve Bank it had paid $348.67 for medical treatment to Vambell, for which the Bank as his employer was responsible under the New York Workmen's Compensation Law, and asked judgment for this amount as the subrogee of Vambell and his employer (R. 7).

The United States moved to dismiss the complaint on the ground that the Federal Tort Claims Act did not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, and on the further ground that the action was barred by R.S. 3477, 31 U.S.C. 203, which prohibits the assignment of claims against the Government before they are allowed (R. 9-13). The District Court held that R.S. 3477 does not apply to suits under the Federal Tort Claims Act, but sustained the Government's motion to dismiss on the ground that the Act, strictly construed, gave a right of action only to one whose claim arose directly out of damage, loss, injury or death, and did not cover the claim of an assignee (R. 20-24). An order dismissing the complaint was entered on January 22, 1948 (R. 25-26), from which an appeal was taken

by respondent, Aetna Casualty & Surety Company (R. 27).

The United States Court of Appeals for the Second Circuit reversed, holding, in an opinion by Judge Frank, with Judge Learned Hand concurring in part, that the Federal Tort Claims Act is not to be strictly construed, that it permits the assignment by state law of an injured workman's cause of action against the United States, that this assignment was involuntary and hence not prohibited by R.S. 3477, as amended (31 U.S.C. 203), but that even if it were otherwise within the terms of that statute, the Federal Tort Claims Act has carved out an implied exception for this type of claim (R. 30-33). The court also held that Congress intended to permit such assignments, even though they will permit venue in a district where the original claimant could not have brought the action (R. 34). As for the conflict which was pointed out between the provision in the Federal Tort Claims Act limiting attorney fees to 20 percent of the recovery and the provision in the New York Workmen's Compensation Law allowing the insurance carrier as assignee to retain one-third of the amount recovered over and above the amount of the compensation award, medical expenses, and expenses of the action, which include attorney fees, the court below merely stated that "The district court, of course, may consider the fact that the state

statute allows plaintiff a portion of the recovery to cover its expenses" (R. 35). Judge Learned Hand concurred in the foregoing rulings, but expressly reserved opinion as to one further ruling, that the loss of the Government's right of counterclaim against the original claimant through the prosecution of the action by an assignee did not "override * * * the direction that we must treat the United States as we would a private individual," since "Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions [in the Federal Tort Claims Act]" (R. 33-34). Judge Hand could see no necessity for passing upon the question whether this action would lie at all, if the United States had suggested that it had a counterclaim against Vambell (R. 35).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the transfer of Vambell's cause of action to respondent was not subject to the provisions of R.S. 3477.

2. In holding that the assignment of Vambell's cause of action to respondent was an involuntary assignment.

3. In holding that even if the assignment of Vambell's cause of action to respondent were otherwise within the provisions of R.S. 3477, the Fed-

eral Tort Claims Act has carved out an implied exception for this type of assigned claim.

4. In holding that the Federal Tort Claims Act permits the Government's right of counterclaim against a claimant to be defeated through the prosecution of the claimant's cause of action by an assignee under state law.

5. In holding that the Federal Tort Claims Act permits venue in a district other than that in which the original claimant could properly have brought the action, by permitting the cause of action to be prosecuted by an assignee of the original claimant.

6. In failing to hold that there is a conflict between the provision of Section 29, Subdivision 2, of the New York Workmen's Compensation Law allowing the insurance carrier to retain one-third of the excess of any recovery it effects on an injured workman's cause of action, over and above the total amount of compensation awarded, the expenses for medical treatment paid by it, and the reasonable and necessary expenditures incurred in effecting such recovery, which includes attorney fees, and the provision of the Federal Tort Claims Act (28 U.S.C. 2678) limiting to 20 percent of the recovery the compensation to be allowed for prosecuting a claim thereunder.

7. In holding that, with regard to the conflict between the provisions of the Federal Tort Claims Act and Section 29 of the New York Workmen's

Compensation Law relating to the amount allowable as compensation for prosecuting a claim, the district court, in fixing attorney fees, "may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses."

8. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Congress, by the Federal Tort Claims Act, made the United States liable on tort claims "in the same manner and to the same extent as a private individual under like circumstances, * * * " (28 U.S.C. 2674), and gave the district courts jurisdiction of civil actions on "claims against the United States, for money damages, for injury or loss of property, or personal injury or death * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346 (b)). Taken literally and alone, this language places the United States in the shoes of a private person in all respects, making it subject to actions on tort claims by assignee or subrogees whenever such actions are permitted against private persons by state law. We submit that these provisions cannot be so applied for the determination of the issue here presented. Other basic interests of the Government as a defendant are defined and preserved by R.S. 3477. This statute,

which prohibits the transfer or assignment of claims against the United States, rests on broad considerations of federal policy which also require recognition. Failure to apply R.S. 3477 will subject the Government to the possibility of multiple suits resulting from the splitting of a cause of action, will permit venue in a district other than that in which the original claimant could properly have brought the action, will defeat the Government's right of counterclaim against the original claimant, and, where the claim arises out of an injury to a person covered by a workmen's compensation statute, will impose on the prosecution of the claim all the incidents of that statute, even though they may be in conflict with the provisions of applicable federal law.[2]

Avoidance of these difficulties is obviously of great importance to the United States, and may be simply effected by invoking R. S. 3477. The availability of this statute to the United States will impair no substantial rights. If a tort is committed for which the United States is liable, an assignee or subrogee of the original claimant has no great interest at stake in demanding that he be permitted

---

[2] The instant case illustrates all but the first of these problems. All of the problems are illustrated by *Yorkshire Insurance Company* v. *United States of America* and *The Home Insurance Company* v. *United States of America*, 171 F. 2d 374 (C. A. 3), and *United States of America* v. *World Fire and Marine Insurance Company*, No. 3715 in the Court of Appeals for the Tenth Circuit, in which the Government is also applying for certiorari.

to recover judgment in his own name. The insurance carriers' contention in this case, and in the related cases in which the Government is applying for certiorari, is entirely technical, consisting of a claimed right to prosecute to judgment in their own names all or part of a cause of action against the United States on which insurance has been paid. There appears to be no reason why the substantial interest of the insurance carriers, their interest in reimbursement out of a possible recovery from the United States, cannot be protected in connection with actions under the Tort Claims Act as that interest has been traditionally protected by the familiar devices of policy cooperation clauses and "borrow and loan" receipts. Cf. *Doleman* v. *Levine*, 295 U. S. 221, 225.

The question thus presented, of great importance to the Government in its administration of the numberless litigations which have arisen and will arise under the Federal Tort Claims Act, does not involve any contention that the Government's waiver of immunity in tort actions, as a matter of substantive right, must be construed "* * * in as niggardly fashion as possible." (R. 32.) In this regard, we believe that the court below has entirely misapprehended the position taken by the Government. Our sole concern is to attain a rule, proper in our view, under which the Government's position as defendant will not be needlessly imperiled or be made unnecessarily difficult without

any general correlative advantage to plaintiffs under the statute. In declining to recognize considerations long accepted as essential to the Government as party defendant under a statute waiving immunity, the holding of the court below is in direct conflict with the result reached by the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Hill,* 171 F. 2d 404, rendered December 17, 1948, in which that court held that the existence of insurance had no effect on a claim and was irrelevant to the trial of it, and that under R. S. 3477 the United States was entitled to the ascertainment of its liabilities unembarrassed by the existence or consequences of the insurance.[3]

1. Under Section 29, as amended, of the New York Workmen's Compensation Law, Vambell's cause of action was automatically assigned to respondent upon Vambell's failure to commence an action against the United States within nine months after the passage of the Federal Tort Claims Act.[4]

---

[3] A rehearing before the Fifth Circuit Court of Appeals *en banc* has been granted in the *Hill* case at the instance of the insurance carrier. The argument has been set for April 15, 1949.

[4] Section 29 formerly provided that the assignment should take place after one year. Since Vambell was injured on February 8, 1945, more than one year had elapsed before the passage of the Federal Tort Claims Act on August 2, 1946. Section 29 was thereafter amended, however, to permit an injured workman to bring an action" * * * not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues."

Admittedly, respondent, as assignee under this statutory assignment, could have maintained an action against a private tortfeasor. It cannot recover in this action against the United States, however, unless this assignment is outside the bar of R. S. 3477. The holding of the court below that R. S. 3477 did not bar the assignment to respondent was based upon two grounds: that the statute did "* * * not apply to involuntary assignments * * *" (R. 33); and that, even if R. S. 3477 did bar the assignment, the Federal Tort Claims Act had carved out an implied exception for the type of claim here involved. We submit that the court below is clearly in error as to both of these suggested grounds.

(a) R.S. 3477 provides that any transfer or assignment of a claim against the United States shall be null and void unless made after the allowance of the claim, the ascertainment of the amount due, and issuance of a warrant for payment. As this Court has observed, "It would seem to be impossible to use language more comprehensive than this." *Spofford* v. *Kirk*, 97 U. S. 484, 488. And it has been held indispensable to the validity of the assertion of an assigned claim against the United States that all statutory requisites have been met. *Spofford* v. *Kirk, supra; United States* v. *Gillis*, 95 U. S. 407; *The John Shilloto Co.* v. *McClung*, 51 Fed. 868, 877 (C. A. 6); *H. M. O. Lumber Co.* v. *United States*, 40 F. 2d 544 (W. D. Mich.). There can be

no doubt that the assignment here involved falls far short of a compliance with any of the requirements of R.S. 3477.

Nor does the assignment here fall within the well-defined exception to the operation of the statute. R. S. 3477 was "* * * passed for the protection of the government * * *", *Hobbs* v. *McLean*, 117 U. S. 567, 576, and was designed to protect the Government from the "* * * danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594. And in *Goodman* v. *Niblack*, 102 U. S. 556, 560, this Court, although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * *." Recognizing the function of the statute, this Court has excepted from its bar the instances where, by virtue of an assignment, the United States was enabled to deal with a universal successor, such as a trustee in bankruptcy or assignee for benefit of creditors. *Goodman* v. *Niblack*, 102 U. S. 556; *Erwin* v. *United States*, 97 U. S. 392.[5] In such cases, it is obvious

[5] The reliance which the court puts on these two decisions is clearly misplaced. An additional decision of this Court cited below, *Price* v. *Forrest*, 173 U. S. 410, is not in point. In the *Price* case, the claim had been ascertained and allowed, and the Government occupied the position of stakeholder, indifferent to the outcome of the dispute.

Reference might also here be made to the remark of the court below that the assignment herein was involuntary in

that the interests of the Government will not be endangered by dealing with such a substituted representative in the same fashion that it would deal with the original claimant. It is equally obvious that this is not such a case. On the contrary, this was the assignment of a single claim only, placing it in the hands of an assignee who, under the decision of the court below, is free to prosecute it without being answerable in any respect on any counterclaim which the United States may have against the assignor.[6]

---

that the claim passed to respondent under the state statute "* * * regardless of Vambell's intent or even of his knowledge * * *" (R. 33). As shown above, the exception of an assignment from R.S. 3477 is a federal question and derives from the function and policy of that statute, not from any automatic test as to the voluntary or involuntary nature of the transfer. In so far as Vambell's subjective intent under the state statute need be consulted, it is sufficient to note that he chose to receive compensation under the state law and to permit the claim to be transferred to the respondent, a choice which can readily be characterized as volitional.

[6] Although the effect on the New York workmen's compensation system of prohibiting the statutory assignment of claims against the United States can have no bearing on the construction to be given R.S. 3477 as applied to such case, we wish to point out that prohibiting the statutory assignment will not frustrate the public policy of New York to enable workmen's compensation carriers to obtain indemnification from negligent third parties responsible for the injuries for which compensation has been paid. Section 29, Subdivision 1, of the New York Workmen's Compensation Law gives the insurance carrier a lien, to the extent of the compensation and medical expenses paid by it, on any recovery had in an action brought by the injured workman. This is adequate provision for the indemnification of insurance carriers and does not conflict with R. S. 3477, since it operates after the amount of the Government's liability on the claim has already been determined in a proper proceeding. See *Houston* v. *Ormes*, 252 U. S. 469, 474; *Price* v. *Forrest*, 173 U. S. 410. If the injured workman fails or refuses to bring an action, the insurance

(b) As a second ground for holding that the assignment here involved was not barred by R.S. 3477, the court below stated: "* * * we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim." (R. 33). No elaboration of this view was advanced. We submit that any exception to the command of R.S. 3477, so easily found below, must be based on compelling considerations and that no such factors are here present. The purposes of the Tort Claims Act are fully served by permitting the person originally sustaining the loss or injury to maintain a tort action against the United States, without also permitting the cause of action to be transferred to another with an absolute right to recover in his own name. This fact alone is sufficient, we submit, to sustain the Government's position herein, in view of the familiar rule that implied repeals are looked upon with disfavor. *General Motors Corp.* v. *United States*, 286 U. S. 49, 61-62; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Borden Corp.*, 308 U. S. 188, 198; *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 209.

But we do not need to rest there, as a specific provision of the Tort Claims Act suggests affirmatively that Congress never intended to change the law regarding the assignability of claims against

---

carrier should be able to protect its right under the state law by bringing an action in the name of the workman. Cf. *Independent Wireless Co.* v. *Radio Corp.*, 269 U. S. 459.

the United States. In granting the right to sue the United States under the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505), Congress expressly preserved the Government's right of counterclaim. The same provision was adopted by reference in the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, Sec. 411, 60 Stat. 844), and in the new Judicial Code the same section covers both types of actions. 28 U. S. C. 1346 (c), Appendix, *infra*, p. 24. We submit that Congress clearly intended this provision as a further implementation of the same policy of assuring certainty in the Government's position which underlies R. S. 3477.

Both opinions below recognized the Congressional purpose in the Federal Tort Claims Act to protect the Government's right of counterclaim against the original claimant (R. 33-34, 35), but nevertheless adhered to a judgment which has the inevitable result of depriving the Government to a greater or lesser extent, if not entirely, of right. Here, as in connection with all of the considerations which we urge, the court below failed to recognize that the decision of questions of counterclaim, venue, and applicability of federal or state law, automatically flow from the central holding that derivative claimants may as a matter of right recover judgment in their own name under the Tort Claims Act. The justifications offered in the opinions below for the result there reached are, at best,

unrealistic. The majority below expressed an opinion that the loss of the right of counterclaim will not in fact be a frequent occurrence, stating that "If the government will probably assert a counterclaim for more than the amount recoverable, we suspect that neither the injured person nor the insurer is likely to bring the action. * * *" (R. 34). It is immediately apparent that this view contains none of the elements of certainty which should attach to the Government's position in connection with exercise of its right, and falls somewhat short of fair recognition of the Government's needs. The existence of a counterclaim against the original claimant will not necessarily deter his assignee from bringing an action, since he can never be held liable on the Government's counterclaim against the assignor. The majority below also stated that "the government may assert a counterclaim arising out of the same transaction to the extent of the plaintiff's recovery" (R. 34). Analytically, this statement fails entirely to meet the problem presented. The Government is not primarily concerned with set-offs or counterclaims arising out of the same transaction. An action under the statute involves a determination whether the Government has been negligent or not. If negligent, it is liable; if not negligent, there can be no recovery. It is principally in connection with counterclaims or set-offs arising out of other transactions that the right reserved by 28 U. S. C. 1346 (c) becomes

important. Such cross claims are, of course, lost if the derivative claimants are permitted to sue under the statute in their own names. Of equal importance is the fact that the Government cannot enforce a counterclaim for damages for negligence against an assignee plaintiff if it be determined on trial that the tort in question resulted from the negligence of the original claimant, the plaintiff's assignor.[7]

The complex possibilities suggested above contrast unfavorably with the certain and clear result which would follow from an adoption of the plain rule for which we contend, namely, that the United States is free to invoke the provisions of R. S. 3477 as a bar to recovery by derivative claimants under the Federal Tort Claims Act. The same criticism may be levelled at the suggestion made by Judge Hand in his concurring opinion, to the effect that district court jurisdiction over tort claims actions by derivative claimants might fail if the United States, in a particular case, had a counterclaim against the original claimant (R. 35). The protection of the Government's interest should be placed on a basis which permits of over-all administration under the policy of R. S. 3477, and not be left to the discretion of trial courts on a case-by-case basis.

---

[7] The problem of venue which is raised by the rulings in this case and in the related cases in which the Government is applying for certiorari is discussed in the petitions in *United States of America* v. *World Fire and Marine Insurance Company*, No. 618, pp. 11-14, and in *United States of America* v. *Yorkshire Insurance Company*, and *United States of America* v. *The Home Insurance Company*, Nos. 619, 620, p. 7.

Thus, if the Government is advised of such a claim by an insurance company, and it appears that there exists no counterclaim against the original claimant and that no substantial problems of splitting actions or of venue exist, the law officers of the Government may determine not to invoke the bar of R. S. 3477. Cf. *Martin* v. *National Surety Co.*, 300 U. S. at 594. Such discretion has traditionally been exercised in proper cases.

2. The decision below raises a special question of great importance in the defense of actions brought under the Federal Tort Claims Act. All of the states except Mississippi have workmen's compensation statutes, and there are federal laws covering longshoremen and harbor workers when injured in maritime employment and private employees in the District of Columbia. Such laws are also operative in Alaska, Hawaii, and Puerto Rico. *Workmen's Compensation: An Outline of Legislation in the United States and Territories as of January 1, 1943,* Bulletin No. 56, United States Department of Labor, p. 1. As is the case with the New York Workmen's Compensation Law, most of these statutes provide for the assignment to the employer of the injured workman's cause of action against a third party tortfeasor, where the workman accepts compensation, while some give both the employer and the employee a right of action, with provision for joinder. Moreover, claims of persons entitled to the benefits of these workmen's compensation statutes are subject to a variety

of provisions relating to the fixing of attorney fees and limiting the right of the claimant to compromise and settle his claim.

Many of the incidents of these statutes are either inconsistent with the provisions of the Federal Tort Claims Act itself or would embarrass the Government in the conduct of its business. Under the Federal Tort Claims Act, attorney fees are limited to 20 percent of the amount recovered by suit. 28 U. S. C. 2678. Criminal penalties are provided for those who charge, demand, receive, or collect an amount in excess of 20 percent "for services rendered in connection with such claim * * * ." Section 29 of the New York Workmen's Compensation Law provides a different measure of compensation for services rendered in the prosecution of the claim by a statutory assignee, for under Subdivision 2 of Section 29 the assignee is entitled to retain one-third of the amount recovered in excess of the total amount of the compensation awarded, the medical expenses paid by it, and the expenses incurred in effecting the recovery. See Appendix, *infra*, p. 31. Such expenses, of course, include attorney fees. See *Lappin* v. *National Container Corp.*, 179 Misc. 109, 112, 37 N. Y. S. 2d 800. To hold that an action against the United States under the Federal Tort Claims Act is in all respects like an action under state law against a private person is to make the provisions of the Act internally inconsistent, for if state law is controlling the limi-

tation in the Act on the compensation allowable for the prosecution of an action is removed. Obviously Congress never intended such a result.

The Court of Appeals made no effort to reconcile this inconsistency, the only reference to it being the statement at the close of the majority opinion that "The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses" (R. 35). As a statement of the New York law this is incomplete, for Section 29 not only allows the statutory assignee the reasonable and necessary expenses incurred in effecting the recovery (in addition to the amount of the compensation award and medical expenses), but it also allows one-third of the excess of the recovery over and above these amounts. Also, this statement can be construed as a suggestion by the Court of Appeals that the district court might, by allowing no attorney fees whatever, keep the assignee's compensation for prosecution of the action within the limits set by Congress.[8] Even if this procedure would work in every case, however, it is inconceivable that Congress intended to make the enforcement of its 20 percent limitation discretionary with district courts.

[8] This would be true where one-third of the net recovery, after deducting the amount of the compensation award, medical expenses, and the expenses of suit other than attorney fees, was no more than 20 percent of the total recovery before deductions. Where one-third of the net recovery would be greater than 20 percent of the whole, even the procedure suggested by the court below would not be sufficient to reconcile the provisions of the state and federal law.

The question whether such state statutes are controlling in proceedings under the Act is squarely presented here and seems plainly of such importance as to require an authoritative decision of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

APPENDIX

STATUTES INVOLVED

1. Sections 1346 (b), 1346 (c), 1402 (b), 2401 (b), 2402, 2412 (c), 2674, 2678, and 2680 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess. [the provisions of the above sections having been formerly embraced in Sections 410 (a), 411, 420, 421, and 422 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-846, as amended by the Act of August 1, 1947, c. 446, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U. S. C. 931 (a), 932, 942, 943, and 944] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * * * *

(b) Subject to the provisions of chapter 173 * of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under

* Apparently should read "171," since that is the number of the chapter on Tort Claims Procedure.

circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2401. *Time for commencing action against United States.*

* * * * * * *

(b) A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the ap-

propriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

28 U. S. C. 2402. *Jury trial denied in actions against United States.*

Any action against the United States under section 1346 of this title shall be tried by the court without a jury.

28 U. S. C. 2412. *Costs.*

* * * * * * * *

(c) In an action under subsection (b) of section 1346 of this title, costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorneys' fees.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U. S. C. 2678. *Attorney fees; penalty.*

The court rendering a judgment for the plaintiff pursuant to section 1346 (b) of this title, or the head of the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney fees, which if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under section 2672 of this title, or 20 per centum of the amount recovered under section 1346 (b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 U. S. C. 2680. *Exceptions.*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty

on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. R. S. 3477 as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of

this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

* * * * * * *

3. Subdivision 1, as amended by L. 1947, c. 9 and 144, and the pertinent provisions of Subdivision 2 of Section 29 of the New York Workmen's Compensation Law, are as follows:

SECTION 29. *Remedies of employees; subrogation.*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the

awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the

cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. * * *

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 837021 491